An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-365

No. COA21-746

Filed 17 May 2022

Vance County, No. 19 CVS 1102

KAREN JEAN SINGLETON, Plaintiff,

v.

DAVID CLINTON MCNABB, M.D. and RALEIGH ORTHOPAEDIC CLINIC, P.A., Defendants.

Appeal by plaintiff from order entered 8 September 2021 by Judge Alyson A. Grine in Vance County Superior Court. Heard in the Court of Appeals 26 April 2022.

Anderson, Johnson, Lawrence & Butler, L.L.P., by Steven C. Lawrence, for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by John W. Minier and Samuel G. Thompson, Jr., for defendants-appellees.

GORE, Judge.

¶ 1 Plaintiff Karen Jean Singleton appeals an Order Imposing Discovery Sanctions. Ms. Singleton concedes that this appeal is interlocutory. Ms. Singleton asserts that any imposition of discovery sanctions is immediately appealable, as the imposition of discovery sanctions affects a substantial right. As discussed below, this Court has held many times that an appellant who asserts an interlocutory order is

immediately appealable because it affects a substantial right must present arguments as to how the specific facts of that case present a substantial right. *Doe v. City of Charlotte*, 273 N.C. App. 10, 21-22, 848 S.E.2d 1, 10 (2020); *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 18, 824 S.E.2d 436, 438 (2019). Ms. Singleton did not do so here, thus, we dismiss this appeal for lack of appellate jurisdiction.

I. Background

¶ 2 On 14 February 2020, following the entry of an Order extending the statute of limitations, Ms. Singleton filed a Complaint against David Clinton McNabb, M.D. and Raleigh Orthopaedic Clinic, P.A. (collectively "defendants"). The Complaint alleges that Dr. McNabb failed to perform adequate leg length analysis and measurements of Ms. Singleton's right leg before Dr. McNabb performed a total replacement of Ms. Singleton's right hip. Dr. McNabb's alleged error resulted in him making Ms. Singleton's leg too long, which required him to repair the leg length during surgery and resulted in damage to the femoral and sciatic nerve. Following surgery, Ms. Singleton experienced a total lack of feeling in her right leg for a period of time, lack of feeling and function in the lower right leg for many months, and excruciating pain and spasms in her hip area and throughout her right leg. Ms. Singleton required substantial physical therapy and use of a wheelchair. Ms. Singleton's complaint alleges negligence on the part of Dr. McNabb and Raleigh Orthopaedic Clinic, P.A.

¶ 3 Defendants filed an Answer on 2 June 2020, denying negligence and liability and asserting numerous defenses.

¶ 4 On 11 March 2021, the trial court entered a Second Amended Consent Discovery Scheduling Order. The Scheduling Order, among other things, ordered that Ms. Singleton shall provide medical records requested by defendants in written discovery on or before 15 March 2021. The Scheduling Order stated that Dr. McNabb's deposition may be requested by Ms. Singleton after she produced the required medical records.

¶ 5 Dr. McNabb's deposition was scheduled for 11 June 2021. Defendants allege that during the deposition Ms. Singleton produced two x-rays which had not been produced before. Ms. Singleton claimed these x-rays were of her leg and contained marking and notes for purpose of measurement made by Dr. McNabb. Once these x-rays were produced, Dr. McNabb's counsel stopped the deposition, went to a separate room to consult with Dr. McNabb following which they terminated the deposition. Following the deposition defendants filed a Motion for Sanctions and Motion to Dismiss.

¶ 6 On 17 August 2021, Ms. Singleton filed a Motion to Compel and Response to Defendants' Motion and Amended Motion for Sanctions and Motion to Dismiss. Ms. Singleton asked the trial court to compel Dr. McNabb to complete his deposition.

¶ 7 The motions came on for hearing on 18 August 2021. Following the hearing,

the trial court entered an Order on 8 September 2021 imposing sanctions pursuant to North Carolina Rules of Civil Procedure 37(b)(2), assessing costs to Ms. Singleton, compelling Ms. Singleton to produce certain discovery materials, and dismissing defendants' Motion to Dismiss. Ms. Singleton filed Notice of Appeal on 5 October 2021.

II. Interlocutory Appeal

¶ 8 Ms. Singleton admits this appeal is interlocutory. However, she asserts that sanctions imposed under North Carolina Rules of Civil Procedure 37(b) affect a substantial right and are immediately appealable. *See Feeassco, LLC v. Steel Network, Inc.*, 264 N.C. App. 327, 331, 826 S.E.2d 202, 207 (2019).

¶ 9 "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 725, 725, 392 S.E.2d 735, 736 (1990). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citations omitted).

¶ 10 There are at least two instances where immediate review of an interlocutory order or judgment is available. "First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is

available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (citation and quotation marks omitted). "[T]he appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citation omitted). "The appellant[] must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) (emphasis in original).

¶ 11 "Admittedly the 'substantial right test' for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). "Essentially a two-part test has developed – the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736 (citation omitted). "Our courts have generally taken a restrictive view of the substantial right exception." *Turner v. Norfolk S. Corp.*, 137 N.C App. 138, 142, 526 S.E.2d 666, 670

(2000) (citation omitted).

¶ 12 Further, for this Court to review an interlocutory order that affects a substantial right the appellant's brief must comply with certain requirements. To confer appellate jurisdiction based on a substantial right, "the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438 (quotations and citation omitted). "Whether a particular ruling 'affects a substantial right must be determined on a case-by-case basis.'" *Doe*, 273 N.C. App. at 21-22, 848 S.E.2d at 10 (quoting *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 78, 711 S.E.2d 185, 189 (2011)). "Consequently, outside of a few exceptions such as sovereign immunity, the appellant cannot rely on citation to precedent to show that an order affects a substantial right. Instead, the appellant 'must explain, in the statement of the grounds for appellate review, why the facts of that particular case demonstrate that the challenged order affects a substantial right.'" *Id.* (quoting *Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438).

¶ 13 This Court's precedent is, thus, clear, that for an interlocutory order to be reviewed based on a substantial right the appellant must make factual arguments as to why the present matter affects a substantial right, even if a previous case reviewing a similar order was deemed to affect a substantial right. In the case *sub*

judice, the appellant's brief's statement of the grounds for appellate review are insufficient to demonstrate why the challenged order affects a substantial right. Here, the statement of the grounds for appellate review contains only an assertion that the appeal is interlocutory and a mere citation to *Feeassco* asserting that sanctions imposed under Rule 37(b) are immediately appealable. Ms. Singleton makes no factual arguments nor points to any facts demonstrating why this particular case affects a substantial right. This is particularly problematic here, because while it is true the trial court ordered sanctions imposed against Ms. Singleton in the form of attorneys' fees, the trial court did not make any determination of the amount of fees to be awarded leaving that issue open for a later determination. *See Porters Neck Ltd., LLC v. Porters Neck Country Club, Inc.*, 276 N.C. App. 95, 99, 2021-NCCOA-41, ¶ 22 *(*"A substantial right is invoked when the sanction ordered is a substantial sum and is immediately payable."); *see also Milone & MacBroom, Inc. v. Corkum*, 279 N.C. App. 576, 579, 2021-NCCOA-526, ¶ 8 ("as a general matter, an appeal from an award of attorneys' fees may not be brought until the trial court has finally determined the amount to be awarded.").

¶ 14 Further, this case does not involve any exceptional facts or procedural history that would justify this Court to *sua sponte* grant a writ of certiorari or invoke North Carolina Rules of Appellate Procedure 2 in order to hear the appeal despite appellant's jurisdictional error. *See Doe*, 273 N.C. App. at 23, 848 S.E.2d at 11. Thus,

we must dismiss the appeal as interlocutory.

III. Conclusion

¶ 15 Ms. Singleton failed to submit sufficient factual arguments in her grounds for appellate review to confer jurisdiction on this Court. Thus, we dismiss appellant's appeal.

DISMISSED.

Judges COLLINS and HAMPSON concur.

Report per Rule 30(e).